88-1525

No. _____

Supreme Court, U.S.
FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

CHARLES FRANK LOFTICE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

Scott H. Robinson
Gerash, Robinson & Miranda, P.C.
1439 Court Place
Denver, Colorado 80202
Telephone (303) 825-5400

Attorney for Petitioner
Charles Frank Loftice

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

26 pp

QUESTION PRESENTED FOR REVIEW

Whether a State may lawfully restrict federally-recognized privileges and immunities inuring to bail bondsmen through imposition of criminal culpability inconsistent with traditional acknowledgements of bondsmen's rights in derogation of the Privileges and Immunities Clause of the United States Constitution, Article IV, Section 2?

TABLE OF CONTENTS

	Pages
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statement of the Case	5
Argument	6
Appendices:	
Appendix A: Colorado Court of Appeals Opinion	App. 1
Appendix B: Colorado Supreme Court Order	App. 8
Appendix C: Colorado Court of Appeals Mandate	App. 10

TABLE OF AUTHORITIES

Pages

CASES:

Baldwin v. Fish and Game Commission, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978) 9

Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952) 8

Cooke v. Harper, 78 Ind. App. 267, 135 N.E. 349 (1922) 9

Curtis v. Peerless Insurance Co., 299 F.Supp. 429 (D. Minn. 1969) 8

Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931) 10

Franco v. Lowry, 164 Ga. 419, 138 S.E. 897 (1927) 9

In Re VonDerAhe, 85 F. 959 (3d Cir. 1898) 8

Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983) 8, 10

Livingston v. Browder, 51 Ala. App. 366, 285 So. 2d 923 (1973) 8

Mease v. State, 165 Ga. App. 746, 302 S.E.2d 429 (1983) 8

Miller v. Commonwealth, 192 Ky. 709, 234 S.W. 307 (1921) 9

Nicolls v. Ingersoll, 7 Johns. 145 (N.Y.S.Ct. 1810) 8

Palmer v. Euclid, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971) 10

Read v. Case, 4 Conn. 166, 10 Am. Dec. 110 (1822) 9

Reese v. United States, 76 U.S. (9 Wall.) 13 (1869) 7, 8, 9

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873) 9

State v. Epps, 36 Or. App. 519, 585 P.2d 425 (1978) 10

State v. Lawrence, 46 S.D. 599, 195 N.W. 441 (1923) 9

TABLE OF AUTHORITIES—Continued

	Pages
Stuyvesant Insurance Co. v. United States, 410 F.2d 524 (8th Cir. 1969)	8
Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985)	9
Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872)	8, 9, 10
United States v. Wheeler, 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed.2d 270 (1920)	9
UNITED STATES CONSTITUTION:	
Article IV, Section 2	2, 8, 10
Amendment XIV, Section 1	8
STATUTES:	
C.R.S. Section 16-4-108	2
C.R.S. Section 18-1-707(1)	3, 10
C.R.S. Section 18-1-707(7)	4, 10
C.R.S. Section 18-3-203(1)	5
C.R.S. Section 18-3-206	5
OTHER AUTHORITIES:	
BLACKSTONE, *Commentaries* 380 (Hammond Ed. 1890)	7
MORRIS, *The Traditional English Sheriff To 1300* (1927)	7
POLLOCK & MAITLAND, *The History Of English Law Before The Time Of Edward The First*, p. 587 (1899)	7

No. _____

In The

Supreme Court of the United States

October Term, 1989

CHARLES FRANK LOFTICE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

OPINION BELOW

The opinion of the Colorado Court of Appeals is set forth in the Appendix, as is a copy of the Order by the Colorado Supreme Court denying Writ of Certiorari, and the subsequent issuance of mandate by the Colorado Court of Appeals.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. § 1254: CERTIORARI JURISDICTION

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution Article IV, Section 2

> *Equality of privileges.* (1) The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.
>
> (2) *Fugitives from justice.* A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.
>
> (3) *Fugitives from service.* No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

United States Constitution Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 16-4-108, Colorado Revised Statutes

> Any person executing a bail bond as principal or as surety shall be exonerated as follows:
>
> (a) When the condition of the bond has been satisfied; or

(b) When the amount of the forfeiture has been paid; or

(c) Upon surrender of the defendant into custody at any time before a judgment has been entered against the sureties for forfeiture of the bond, upon payment of all costs occasioned thereby. A surety may seize and surrender the defendant to the sheriff or the county wherein the bond is taken, and it is the duty of the sheriff, on such surrender and delivery to him of a certified copy of the bond by which the surety is bound, to take the person into custody and, by writing, acknowledge the surrender. If a compensated surety is exonerated by surrendering a defendant prior to the appearance date fixed in the bond, the court, after a hearing, may require the surety to refund part or all of the bond premium paid by the defendant if necessary to prevent unjust enrichment.

§ 18-1-707(1), Colorado Revised Statutes

Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary;

(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use or deadly physical force; or

(b) To effect an arrest, or to prevent the escape from custody, of a person whom he reasonably believes;

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon; or

(III) Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

(3) Nothing in subsection (2)(b) of this section shall be deemed to constitute justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

(4) For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody. A peace officer who is effecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subsections (1) and (2) of this section unless the warrant is invalid and is known by the officer to be invalid.

§ 18-1-707(7), Colorado Revised Statutes

A private person acting on his own account is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest, or to prevent the escape from custody of an arrested person who has committed an offense in his presence; but he is justified in using deadly physical force for

the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use of deadly physical force.

§ 18-3-203(1), Colorado Revised Statutes

A person commits the crime of assault in the second degree if:

(b) with intent to cause bodily injury to another person, he causes or attempts to cause such injury to any person by means of a deadly weapon;

(d) He recklessly causes serious bodily injury to another person by means of a deadly weapon . . ."

§ 18-3-206, Colorado Revised Statutes

A person commits the crime of menacing if, by any threat or physical action, he knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a Class III misdemeanor, but, if committed by the use of a deadly weapon, it is a Class V felony.

———o———

STATEMENT OF THE CASE

Petitioner Charles Frank Loftice, a bail bondsman, was charged in state court with allegedly violating state criminal law statutes involving the use of physical force: assault and menacing. Loftice was and is a licensed professional bail bondsman, experienced in his trade. A surety bond had been provided by Loftice to a convicted felon who had multiple cases then pending: Lee Kim Meller. Meller was charged with motor vehicle theft, resistance, and criminal trespass, and thereafter purposely and intentionally failed to make his appearances.

Relying on established federal authority, Charles Frank Loftice went to where Meller was living, to take

Meller into custody. Meller hid in a closet, but finally came out of the bedroom and surrendered. Petitioner had reason to be concerned about his own safety, by virtue of his knowledge of Meller's past assaultive behavior, and a "shooting award" prominently displayed on a mantle in the residence.

As a consequence, Petitioner had a firearm with him as he and Meller left the home. Meller was unaware that Petitioner had a firearm, and attempted to escape. In the ensuing struggle between the two men, the firearm discharged, wounding Meller. Petitioner was also injured in the affray.

Upon jury trial, Petitioner was convicted of both second degree assault and menacing. The Colorado Court of Appeals affirmed the conviction; certiorari to the Colorado Supreme Court was refused.

———o———

ARGUMENT

THE APPLICATION OF STATE LAW RESTRICTING A BONDSMAN'S RIGHTS TO SEIZE THE PRINCIPAL VIOLATED CHARLES FRANK LOFTICE'S ESTABLISHED RIGHT AS A BAIL BONDSMAN IN DEROGATION OF PRIVILEGES AND IMMUNITIES GUARANTEED BY THE UNITED STATES CONSTITUTION.

Frank Charles Loftice, the Petitioner, was lawfully engaged in the enterprise of bail bondsman, and sought to secure the custody of his principal, who had willfully failed to appear in compliance with the bond conditions. This seizure was within his federally recognized rights: the power of bail bondsmen was first recognized by this

Honorable Court in *Reese v. United States,* 76 U.S. (9 Wall.) 13 (1869). In *Reese,* this Court recognized and acknowledged established law of ancient duration: that a principal released to the custody of a bail bondsman can be surrendered at any time to the court, for any or no reason, and all necessary force can be used to effect the seizure. For hundreds of years prior to *Reese,* these principles had become well-established. Bail is an ancient practice, arising out of *ad hoc* arrangements between sheriffs and prisoners, where accused persons would be informally released either on their own recognizance, or on the promise of others. Bail was eventually codified in 1275 in the Statute of Westminster, 3 Edw. I, c. 15. *See* 2 POLLOCK & MAITLAND, *The History Of English Law Before The Time Of Edward The First,* p. 587 (1899); MORRIS, *The Traditional English Sheriff To 1300* (1927). Thereafter, our more modern system of bail evolved, with the use of formal sureties, and the sureties' concomitant right of seizure. 4 BLACKSTONE, *Commentaries* 380 (Hammond Ed. 1890).

As a consequence, bail and its attendant rights were established at common law, as were the recognized traditional rights of bail bondsmen, at the time of ratification of the United States Constitution. Entitlement to bail was embodied within the privileges and immunities clause in Article IV, Section 2; indeed, in addition to establishing entitlement to traditional privileges and immunities, § 2 created a federal system of extradition and continuation of servitude. These legal principles were ratified at the very outset of this nation's existence.

Although *Reese v. United States* represented the initial recognition by this Honorable Court of the power of

the bail bondsman, three years later this Court stated in *Taylor v. Taintor,* 83 U.S. (16 Wall.) 366 (1872) that:

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re arrest, by the sheriff, of an escaping prisoner.

Reese and *Taylor* remained intact, forming the basis of countless state court decisions for the next century. They still remain the law. As a consequence, bondsmen have extraordinary powers, presumably to be given equal recognition in all states, in the exercise of their right to seize and effect the surrender of a principal, even to the use of force in the seizure. *See Carlson v. Landon,* 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952); *Kear v. Hilton,* 699 F.2d 181 (4th Cir. 1983); *Stuyvesant Insurance Co. v. United States,* 410 F.2d 524 (8th Cir. 1969); *Mease v. State,* 165 Ga. App. 746, 302 S.E.2d 429 (1983); *Curtis v. Peerless Insurance Co.,* 299 F.Supp. 429 (D. Minn. 1969); *Livingston v. Browder,* 51 Ala. App. 366, 285 So.2d 923 (1973); *In Re VonDerAhe,* 85 F. 959 (3d Cir. 1898). *See also Nicolls v. Ingersoll,* 7 Johns. 145 (N.Y.S.Ct. 1810).

The embodiment of a bondsman's entitlement is guaranteed under Article IV, § 2(1), and the Fourteenth Amendment. Although the precise contours of the privileges and immunities clause is "not well developed", it

unquestionably stands for the proposition that an individual has a right to pursue a livelihood, as framed through history, established common law entitlement, and natural rights, unfettered by restrictive state law. *Baldwin v. Fish and Game Commission,* 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978). The "means of a livelihood", a citizen's "common calling", is unquestionably provided protection under the privileges and immunities clause. *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985); *Baldwin v. Fish and Game Commission, supra.*

Historically, bail bondsmen could arrest their principal, without resort to law enforcement authorities, a right recognized by numerous state court decisions in addition to the decisions of this Court in *Reese* and *Taylor. See, e.g., Franco v. Lowry,* 164 Ga. 419, 138 S.E. 897 (1927); *State v. Lawrence,* 46 S.D. 599, 195 N.W. 441 (1923); *Cooke v. Harper,* 78 Ind. App. 267, 135 N.E. 349 (1922); *Miller v. Commonwealth,* 192 Ky. 709, 234 S.W. 307 (1921). Indeed, it had long been established that the bail bondsmen could "break and enter" to arrest the principal, and could use violent force where, as here, the principal resisted "even to the shedding of blood." *Read v. Case,* 4 Conn. 166, 10 Am. Dec. 110 (1822). These long-standing principles of bail law are protected under the privileges and immunities clause, just as the right of free ingress and egress, to go from state to state in pursuit of lawful commerce, is constitutionally guaranteed. *See United States v. Wheeler,* 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed.2d 270 (1920). *See also Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873).

In light of long standing authority, the Constitution requires "fair notice" if, as, and when, the law changes. *See, e.g., Palmer v. Euclid,* 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971); *State v. Epps,* 36 Or. App. 519, 585 P.2d 425 (1978). Despite this, the jury at Petitioner's trial was instructed as though Petitioner were an ordinary citizen, and not a bail bondsman effecting the seizure of his principal. *Contrast* § 18-1-707(1)-(4), *with* § 18-1-707 (7), C.R.S. Although Colorado statutory law provides the principles of exoneration in § 16-4-108, C.R.S., no state statute in effect at the time of the within occurrence delineated the extent and limitations of such seizures. The jury was instructed by the trial judge consistent with only the limited power to arrest accorded private citizens, inconsistent with hundreds of years of established authority, in violation of Article IV, § 2 of the United States Constitution.

It is established as a matter of federal law that the principal consents to seizure by the bail bondsman; for all intents and purposes, the principal is the bondsman's prisoner. *Fitzpatrick v. Williams,* 46 F.2d 40 (5th Cir. 1931). Charles Frank Loftice had a right to rely on *Taylor v. Taintor, supra,* in effecting the seizure of Lee Kim Meller, a privilege and immunity inuring to professional bail bondsmen throughout the country for centuries. Although "it has been a long time since 1872", *Taylor v. Taintor* has never been overruled or limited. *See Kear v. Hilton, supra* n. 2. As a consequence, Petitioner had a right to rely on this federal pronouncement, as governing authority, of his seizure powers; the application of inconsistent state laws violated his rights under Article IV, Sec-

tion 2 of the United States Constitution, hence justifying issuance of certiorari to restore the bondsman's lawful authority.

Respectfully submitted,

Scott H. Robinson
Gerash, Robinson & Miranda, P.C.
1439 Court Place
Denver, Colorado 80202
Telephone (303) 825-5400

Attorney for Petitioner
Charles Frank Loftice

APPENDIX A

COLORADO COURT OF APPEALS

No. 87CA0742

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
v.
CHARLES FRANK LOFTICE,
Defendant-Appellant.

Appeal from the District Court of El Paso County
No. 86CR1718

Honorable David D. Parrish, Judge

(Filed September 1, 1988)

DIVISION V JUDGMENT AFFIRMED
Opinion by JUDGE PLANK
Van Cise and Fischbach, JJ., concur

Duane Woodard, Attorney General
Charles B. Howe, Chief Deputy Attorney General
Richard H. Forman, Solicitor General
Cynthia D. Jones, Assistant Attorney General
Denver, Colorado

Attorneys for Plaintiff-Appellee

Morton L. Davis
Aurora, Colorado

Attorney for Defendant-Appellant

Defendant, Charles Frank Loftice, appeals the judgment of conviction entered on jury verdicts finding him guilty of second degree assault and menacing. He contends the trial court failed to instruct the jury properly on his theories of defense, and claims there was insufficient evidence to support the verdicts. We affirm.

Defendant, a professional bondsman, provided a surety bond for Lee Kim Meller (Meller). When Meller

failed to appear for a scheduled court date, defendant proceeded to his home for the purpose of taking him into custody. Meller and defendant exited the residence together, but once outside, Meller ran from defendant. Defendant, who was armed with a gun, pursued him. Upon catching Meller, a struggle ensued and both men fell to the ground. The impact caused defendant's gun to discharge, resulting in Meller being shot.

I.

We initially address defendant's challenge to the court's affirmative defense instruction to the crime of menacing. The instruction stated, in pertinent part, that defendant, in his professional capacity, was entitled to use "reasonable and appropriate physical force upon another person when and to the extent that he reasonably believed it necessary to effect a seizure and surrender of the person on bond." Defendant argues that he was prejudiced by the submission of this instruction because it has no legal basis and no application to the elements of the crime of menacing or the facts of this case. We disagree.

Defendant raised no objection to the instruction during trial, and hence, we must determine whether its submission rose to the level of plain error. *See* Crim. P. 52(b). The standard of plain error review is whether an appellate court, after reviewing the entire record, can say with fair assurance that the error at issue so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Wilson v. People*, 743 P.2d 415 (Colo. 1987).

We conclude that the submission of the challenged instruction, far from being plain error, was proper as an explanation of the legal standards applicable to the issues raised by defendant during trial.

It was defendant's theory that he was entitled, under § 16-4-108(1)(c), C.R.S. (1986 Repl. Vol. 8A), to seize and surrender Meller for failure to appear in court, and the jury was instructed on this statutory right. Defendant further claimed that the actions taken in his pursuit of Meller were reasonable and justified, and that the discharge of the gun was accidental. The challenged instruction properly presented these issues to the jury.

A defendant is entitled to a theory of defense instruction which includes an explanation of his actions when there is evidence in the record to support it. *People v. Shearer,* 650 P.2d 1293 (Colo. App. 1982). Because the model jury instructions will not apply to every case, it may be necessary to tailor an instruction to fit the particular facts and issues raised at trial. *See People v. Armstrong,* 720 P.2d 165 (Colo. 1986). There is no pattern jury instruction specifically addressed to a surety's right to seize and surrender a person who has violated the conditions of his bond. However, because at trial defendant raised the issue of the reasonableness of his actions, the court was correct in framing an affirmative defense instruction which informed the jury of his theories.

We find no merit in defendant's contention that the instruction had no legal basis because it was patterned after the model instruction on a private citizen's use of physical force to effectuate an arrest. The instruction given was specifically tailored to reflect the reasonable-

ness of defendant's use of force in his capacity as a bondsman, and contained no language pertaining to arrest.

Nor are we persuaded by defendant's argument that the instruction was incomplete because it failed to describe how and under what circumstances a bondsman may seize a principal. The General Assembly has determined that a bondsman has the power to seize and surrender a principal, but it has not specified appropriate or acceptable methods for effectuating a seizure. *See* § 16-4-108 (1)(c), C.R.S. (1986 Repl. Vol. 8A). Hence, the pertinent inquiry is not how a seizure may be effectuated, but rather the reasonableness of the action taken under the circumstances. This determination was properly left to the jury as the finder of fact.

Finally, defendant argues that the instruction was erroneous because it did not specifically track one of the elements of the crime, menacing with a deadly weapon.

Section 18-3-206, C.R.S. (1986 Repl. Vol. 8B) provides that:

> "A person commits the crime of menacing if, by any *threat* or physical action, he knowingly places or attempts to place another person in fear of imminent serious bodily injury. Menacing is a class 3 misdemeanor, but, if committed by the use of a deadly weapon, it is a class 5 felony." (emphasis added).

The affirmative defense instruction omitted the word "threat" and referred only to physical force. Defendant argues that this deletion implied that the defendant, in fact, had used physical force.

Although it is better practice to frame an individualized affirmative defense instruction in the language of the

statute, *see Bustamonte v. People,* 157 Colo. 146, 401 P.2d 597 (1965), the omission of the term "threat" did not constitute plain error here. The record demonstrates that defendant's actions during the chase and struggle were sufficient to place Meller in fear of imminent serious bodily injury. Further, the primary thrust of defendant's defense, as evidenced by his testimony, related to the appropriateness of the physical action he took against Meller. Because it was not contested that physical action was actually taken, we find no reasonable possibility that the alleged instructional error contributed to defendant's conviction.

II.

Defendant next contends the trial court erred in failing *sua sponte* to instruct the jury on an affirmative defense to second degree assault. He claims an instruction similar to the one given on the menacing charge should have been submitted. Again, we disagree.

The jury was instructed on the elements of second degree reckless assault and the elements of the lesser included offense of third degree criminally negligent assault. The terms "recklessly" and "criminal negligence" were defined in a separate instruction. Based upon these definitions, we fail to see how the jury could have found defendant acted recklessly and yet at the same time reasonably. A finding of recklessness as defined in the instructions necessarily precludes a finding that defendant's actions were reasonable. *See People v. Fink,* 194 Colo. 516, 574 P.2d 81 (1978). Hence, any error in the omission of an affirmative defense instruction was harmless.

III.

Although no objection was raised at trial, defendant maintains on appeal that the theory of defense instruction submitted to the jury was so prejudicial as to require a new trial. The instruction stated it was "a part of" defendant's theory of the case that the gun discharged accidentally. Defendant argues that inclusion of the words "a part of," made the instruction confusing, and he further claims it was incomplete because it did not include an explanation of his theory that his actions were justified and reasonable under the circumstances. We find no merit in these contentions.

In order to determine whether the jury has been adequately informed of defendant's theory of the case, the instructions must be considered as a whole. *People v. Tippett*, 733 P.2d 1183 (Colo. 1987). The trial court need not submit a theory of defense instruction if the instruction merely restates points made in other instructions. *People v. Young*, 710 P.2d 1140 (Colo. App. 1985).

Here, defendant's various theories are adequately encompassed in the instructions when read as a whole. Further, the accidental discharge of the gun was indeed only one of several theories raised by defendant, and hence, the wording of the instruction accurately stated the pertinent circumstances.

IV.

Defendant also contends the evidence was insufficient to support the verdicts. Upon reviewing the record presented, we conclude that the evidence, albeit at times contradictory, was sufficient to support the jury verdicts. *See Taylor v. People*, 723 P.2d 131 (Colo. 1986).

In view of the foregoing, defendant's remaining contention is without merit.

Judgment affirmed.

JUDGE VAN CISE and JUDGE FISCHBACH concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO

Case No. 88SC514

Certiorari to the Colorado Court of Appeals 87CA0742
El Paso County District Court 86CR1718

ORDER OF COURT

CHARLES FRANK LOFTICE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

(Filed January 23, 1989)

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 23, 1989.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

Gerash, Robinson & Miranda, P.C.
Scott H. Robinson
1439 Court Place
Denver, CO 80202

Duane Woodard, Attorney General
Charles B. Howe, Deputy Attorney General
Richard H. Forman, Solicitor General
Cynthia D. Jones, Assistant Attorney General
1525 Sherman Street, 3rd Floor
Denver, CO 80203

Honorable David D. Parrish
El Paso County District Court
Judicial Building
20 East Vermijo
Colorado Springs, CO 80903

(SEAL)

APPENDIX C

Appeal from the District Court of El Paso, Colorado, to the Colorado Court of Appeals. Opinion issued & judgment entered September 01, 1988, before Plank, Van Cise and Fischbach, JJ.

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

M A N D A T E

Court of Appeals No. 87CA0742
Trial Court No. 86CR1718

PEOPLE v. CHARLES FRANK LOFTICE

This cause came to be heard on the record on appeal from the District Court of the County of El Paso and was argued by counsel, on consideration thereof, it is ordered that the Judgment of said Court is AFFIRMED.

DATE: January 27, 1989

GARY SONKE
Clerk of Court

/s/ Robbie O'Connell
by: Robbie O'Connell
Deputy Court Clerk

COURT OF APPEALS
STATE OF COLORADO

Date 01/27/89
Gary Sonke
Clerk of Court of Appeals

/s/ R. O'Connell
Deputy Clerk

(SEAL)